DOCUMENT RESUME

ED 316 298 JC 900 168

AUTHOR Eley, Robert H.
TITLE Legal Cases Related to Faculty Tenure in Washington State Colleges and Universities.
PUB DATE 8 Mar 90
NOTE 69p.
PUB TYPE Reports - Research/Technical (143)

EDRS PRICE MF01/PC03 Plus Postage.
DESCRIPTORS Community Colleges; *Court Litigation; Higher Education; *Legal Problems; Nontenured Faculty; *Politics of Education; State Colleges; State Universities; *Teacher Rights; *Tenure; Tenured Faculty; Two Year Colleges
IDENTIFIERS *Washington

ABSTRACT

An overview is provided of the issues, procedures, and prevailing judicial rationale for faculty tenure decisions in the state of Washington. All legal cases decided in Washington and cases from other jurisdictions that have had an impact on Washington law are summarized in this digest. Each case summary consists of an introduction of issues considered by the court, notation of past legal procedures, presentation of the facts of the case, and a description of the court's holding and rationale. The first 11 cases involved Washington community college faculty. The cases focused on loss of tenure because of inability to work with others; department chairmanship as a non-tenured position; part-time faculty; contract and tenure rights; denial of tenure with no reason given; termination on the grounds that tenure procedures were inapplicable; mandatory retirement versus voluntary resignation; denial of tenure on the grounds of declining enrollment; tenured faculty layoffs due to financial emergency; denial of tenure in a case where the probationary period had been extended; and tenured faculty layoff due to a budget reduction. Cases in Washington's four-year colleges and universities focused on the loyalty oath; loss of tenure due to sexual misconduct, insubordination, and financial exigency; and denial of tenure contested on the grounds of conspiracy and sex discrimination. Related cases in other jurisdictions dealt with a teacher dismissal in Illinois, denial of tenure with no reason given in Wisconsin, and termination regardless of de facto tenure in Texas. (JMC)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED316298

LEGAL CASES RELATED TO FACULTY TENURE IN WASHINGTON STATE COLLEGES AND UNIVERSITIES

Final Paper
ED AD 578 - Principles of Educational Law
Seattle University
Dr. Sharon Howard - Adjunct Professor

TC 900 168

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

R. H. Eley

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

Prepared by

Robert H. Eley

March 8, 1990

BEST COPY AVAILABLE

TABLE OF CONTENTS

I. Introduction..... iv

II. Washington State Community College Cases

Loss of Tenure: Inability to Work with Others..... 1
Bowing v. Board of Trustees, 11 Wn. App. 33, 521 P. 2d 220 (1974)

Department Chairmanship: Not a Tenured Position..... 4
Barnes v. Community College District 20, 85 Wn. App. 90, 529 P. 2d 1102 (1975)

Loss of Tenure: One Hearing Required..... 6
Bowing v. Board of Trustees, 85 Wn. 2d 300, 534 P. 2d 1365 (1975)

Part-Time Faculty: Contract and Tenure Rights..... 9
McLachlan v. Tacoma Community College, 14 Wn. App. 372, 541 P. 2d 1010 (1975)

Denial of Tenure: No Reason Given..... 12
Smith v. Greene, 86 Wn. 2d 363, 545 P. 2d 550 (1976)

Termination: Tenure Procedures Inapplicable..... 17
Rutcosky v. Board of Trustees, 14 Wn. App. 786, 545 P. 2d 567 (1976)

Mandatory Retirement: Voluntary Resignation..... 18
Elliot v. Board of Trustees 29 Wn. App. 890, 631 P. 2d 985 (1981)

Denial of Tenure: Declining Enrollment..... 20
Causey v. Board of Trustees, 30 Wn. App. 649, 638 P. 2d 98 (1981)

Tenured Faculty Layoffs: Financial Emergency..... 22
Washington Education Association v. State, 97 Wn. 2d 899, 652 P. 2d 1347 (1982)

Denial of Tenure: Probationary Period Extended..... 25
Eyre v. Big Bend Community College, 36 Wn. App. 154, 672 P. 2d 1270 (1983)

Tenured Faculty Layoff: Budget Reduction..... 28
Keppler v. Board of Trustees, 38 Wn. App. 729, 688 P. 2d 512 (1984)

TABLE OF CONTENTS (Continued)

III. Washington State Four-Year College and University Cases

Loyalty Oath: Right to a Hearing..... 31
Nostrand v. Little, 58 Wn. 2d 111, 361 P. 2d 551. (1961)

Loyalty Oath: Lack of Federal Question..... 34
Nostrand v. Little, 368 U.S. 436, 7 L.Ed 2d 426, 82 S.Ct. 464 (1962)

Loss of Tenure: Sexual Misconduct..... 35
Lehman v. Board of Trustees, 89 Wn. 2d 874, 576 P. 2d 397 (1978)

Denial of Tenure: Conspiracy Not Established..... 37
Allard v. Board of Regents, 25 Wn. App. 243, 606 P. 2d 280 (1980)

Loss of Tenure: Insubordination..... 38
Stastny v. Board of Trustees, 32 Wn. App. 239, 647 P. 2d 496 (1982)

Denial of Tenure: Sex Discrimination Not Established..... 44
Amoss v. University of Washington, 40 Wn. App. 666, 700 P. 2d 350 (1985)

Loss of Tenure: Financial Exigency..... 48
Refai v. Central Washington University, 49 Wn. App. 1, 742, P. 2d 137 (1987)

IV. Other Jurisdictions

Teacher Dismissed: Free Speech Issue (Illinois)..... 55
Pickering v. Board of Education, 391 U.S. 563 (1968)

Denial of Tenure: No reason Given (Wisconsin)..... 57
Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed. 2d 548, 92 S.Ct. 2701 (1972)

Termination: Possible De Facto Tenure (Texas)..... 59
Perry v. Sindermann, 408 U.S. 593, 33 L.Ed. 2d 570 (1972)

V. Bibliography..... 63

INTRODUCTION

College and university faculty who successfully complete a probationary period and are awarded tenure can be dismissed only for cause or for a bona fide financial emergency. Dismissal for cause necessitates a review of the reasons for discharge by a faculty committee which reports findings and recommendations to the governing board of the institution. If the board agrees with committee findings, a final decision is rendered that is consistent with those findings. When agreement does not exist, the board states its objections and asks the committee for reconsideration before making a final decision that overrules the committee. Probationary faculty have a right to complete their individual one-year contracts but have no rights to continuing employment. (Joughlin, 1967)

While describing several myths about faculty tenure, Arvo Van Alstyne observed that tenure is not easily acquired. He pointed out that probationary faculty members are comprehensively evaluated over a period of years, mainly by peers, before being recommended for tenure. Those who do not receive tenure usually leave quietly. (Van Alstyne, 1973)

Bowen and Schuster acknowledged that tenure "has never been an absolute right of faculty members." and listed four reasons that are appropriate for faculty dismissal:

> . . . (1) medical disability, (2) "cause" meaning incompetence, a serious offense, or dereliction of duty, (3) discontinuance of a program or department based upon educational considerations, and (4) retrenchment due to 'financial exigency.'

They also pointed out that governing boards and administrators are reluctant to upset their institutions by discharging faculty and will do so only as a last resort. In referring to the process for terminating tenured faculty members, they said, "The procedures take on the flavor of a trial for murder." (Bowen and Schuster, 1986)

The purpose of this paper is to provide insight into issues, procedures, and prevailing judicial rationale for all reported faculty tenure cases in the state of Washington. Toward that end, all such cases in WESTLAW databases WAED-CS and FED-SCT were condensed and compiled into this digest. In some of these cases, tenure was denied or lost or merely questioned. Cases from other jurisdictions are included because they appear as important references in these Washington college and university cases.

In each case, issues being considered by the court are introduced; then, past legal procedures are noted; facts are brought out; and, the court's holding and rationale are described.

LEGAL CASES RELATED TO FACULTY TENURE IN WASHINGTON STATE COLLEGES AND UNIVERSITIES

WASHINGTON STATE COMMUNITY COLLEGE CASES

LOSS OF TENURE: INABILITY TO WORK WITH OTHERS

Bowing v. Board of Trustees
11 Wn. App. 33, 521 P. 2d 220 (1974)

In *Bowing v. Board of Trustees*, the Washington State Court of Appeals decided that a community college board of trustees can terminate a tenured faculty member for an inability to work with others.

Green River Community College Board of Trustees terminated tenured faculty member Shirley Bowing and she sought judicial review of her dismissal. The King County Superior Court granted her motion for summary judgment and the college appealed.

Shirley Bowing was informed in a letter from the college president that charges had been made against her which could cause her termination. The charges were, "(1) ineffective teaching and (2) inability to work with other staff members to the degree that student welfare was adversely affected." 11 Wn. App. 34. The letter

gave examples for each charge and set forth the time and place for a review committee hearing. After hearing testimony from both sides, including cross-examination of witnesses, the committee recommended against termination. The board of trustees reviewed the committee's report with Bowing, the college president, and their respective attorneys. The board accepted the review committee finding on the first charge, but disagreed with the finding on the second charge and sent it back to the committee for reconsideration. The review committee came to the same conclusion after reconsidering the evidence in light of the board's concerns. The board of trustees found the review committee conclusions on the second charge to be faulty. The board conducted an investigation, concluded that the second charge was substantiated, and proceeded to terminate Bowing.

The trial judge concluded that Bowing did not have a fair hearing because the "review committee is vested with exclusive authority to make factual findings" [11 Wn. App. 36] and the board of trustees "invaded the province of the Review Committee" [11 Wn. App. 36] by substituting their findings for those of the committee. The Court of Appeals disagreed with the trial court because the board of trustees was required by statute to establish rules for implementing tenure statutes, and Green River's rules allowed the board of trustees to overrule the review committee. In addition, the appeals court found that:

> No authorization to delegate the power of dismissal is provided in the Community College Act of 1967, RCW 28B.50. And, as pointed out in *In re Puget Sound Pilots Ass'n*, 63 Wn. 2d 142, 385 P. 2d 711 (1963), although RCW 34.040.110 permits a subdelegation for the purpose of taking testimony and securing evidence, there can be no delegation of the ultimate power to

> dismiss without express statutory authority. The trial judge erred in concluding that the board was bound by the committee's factual findings. 11 Wn. App. 39

The trial court also concluded that Bowing was improperly terminated because she was not given a "proposal for decision" [11 Wn. App. 40] and an opportunity for a hearing after the review committee made its final findings and conclusions but before the board voted for her dismissal. The Appeals Court, agreeing that Bowing should have been given another hearing, said:

> Fundamental to the "tenure code" is the right to due process. RCW 28B.50.851. The requirement for due process is a recognition that "tenure" is a constitutionally protected property right. *Cf. Perry v. Sindermann*, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972); *Deering v. Seattle*, 10 Wn. App. 832, 520 P. 2d 638 (1974).
>
> The right to due process, at minimum, means the right to be heard. But the right to be heard is meaningless unless it is afforded at "a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965). 11 Wn. App. 40, 41.

The Court of Appeals disagreed with reversal of the board's decision to terminate Bowing but sent the case back to the board of trustees for a proper hearing.

A petition for rehearing by the Court of Appeals was denied. A review was granted by the Washington State Supreme Court. A summary of that case begins on page 6 of this paper.

DEPARTMENT CHAIRMANSHIP: NOT A TENURED POSITION

Barnes v. Community College District 20

85 Wn. App. 90, 529 P. 2d 1102 (1975)

In this case, the Washington State Supreme Court decided that the Walla Walla Community College department chairmanship was not a tenurable faculty position.

Walla Walla Community College, in an administrative reorganization, abolished the position of department chair. Teachers who had held those positions asked for a college review of this change to their employment contracts. A review was not granted so they initiated a suit against the college.

The teachers asserted that their department chair positions were tenured; that elimination of the positions could only be accomplished through due process; and, that they were not given due process. The Superior Court for Walla Walla County granted their motion for summary judgment. The college appealed.

The Court of Appeals said the basis for the teachers' argument was:

> In 1970 the definition of "faculty appointment" in RCW 28B.50.851 (2) was amended, so that the subsection presently provides:

> (2) "Faculty appointment" shall mean full time employment as a teacher, counselor, librarian or other position for which the training, experience and responsibilities are comparable as determined by the appointing authority, except administrative appointments; *"faculty appointment" shall also mean department heads, division heads and administrators to the extent that such department heads, division heads or administrators have had or do have status as a teacher, counselor, or librarian;* 85 Wn. App. 91

The trial court granted a summary judgment based on the fact that administrators, who previously held teaching positions, were granted tenure by the 1970 amendments.

The Court of Appeals disagreed with the trial court by emphasizing the language "to the extent that [they] have had or do have status as a teacher" [85 Wn. App. 92]. According to the 1970 amendments, tenure could only be granted to administrators on the basis "of the previous position as teacher, counselor, or librarian." [85 Wn. App. 93]. While acknowledging that the statute was vague, this court reasoned that its own interpretation was in concert with AAUP principles on tenure which include academic freedom in research and in the classroom. The court quoted from the AAUP:

> The chairman or department head should not have tenure in his office; his tenure as a faculty member is a matter of separate right. *AAUP, Policy Documents and Reports* 38 (1973). 85 Wn. App. 94

The court also cited *Zumwalt v. Trustees of California State Colleges*, 33 Cal. App. 3d 665, 109 Cal. Rptr. 344 (3d Dist. Ct. App. 1973), in which the California

court found that tenure did not extend to an administrative position and pointed out that the legislature would not be vague on such an important change to the applicability of tenure.

The Court of Appeals reversed the Superior Court judgment.

LOSS OF TENURE: ONE HEARING REQUIRED

Bowing v. Board of Trustees
85 Wn. 2d 300, 534 P. 2d 1365 (1975)

The Washington State Supreme Court reversed a Division One Court of Appeals decision which ordered Green River Community College to conduct another hearing for a tenured teacher who had been terminated for cause.

Initially, the board of trustees terminated Shirley Bowing and she requested a judicial review. King County Superior Court granted her motion for a summary judgment on the basis that the board of trustees had not followed necessary procedures. The college appealed. The Court of Appeals reversed the trial court decision and remanded the case to the college board of trustees for another

hearing. The teacher and the college appealed to the Washington State Supreme Court: Bowing, for an alleged jurisdictional error; and the college, for judicial review of the case.

Bowing contended that the Court of Appeals should have dismissed the college appeal because it was not received within 30 days of the trial court judgment. Therefore, the Court of Appeals had no jurisdiction to hear the appeal. The Supreme Court found that the trial court made a partial judgment, then reconvened to settle questions of damages and attorneys fees which concluded the case. The appeal was then made within 30 days of that final judgment. The Supreme Court concluded that the Court of Appeals was correct in not dismissing the case. Hence, the court proceeded with a judicial review of the college appeal.

Two charges had been brought against the teacher which could be cause for termination. A hearing was conducted by a college committee which did not find merit with either charge. The committee reconsidered one of the charges, at the request of the college board of trustees, and came back with the same recommendations. The trustees conducted their own investigation and their findings and conclusions did not agree with the committee recommendation. Using their own facts and conclusions, the trustees terminated Bowing. The lower courts found that Bowing had not been given an opportunity for hearing after the committee's reconsideration and before termination. This was considered a violation of due process and was the basis for the trial court's summary judgment and the Court of Appeals' remand to the board of trustees. The Supreme Court examined applicable

statutes and rules and reviewed questions of whether the trustees should have had another hearing and whether they should: "personally consider the whole record" [85 Wn. 2d 305]; have "heard or read the evidence" [85 Wn. 2d 306]; "personally consider [read] the whole record" [85 Wn. 2d 306]; "have heard the case or read the record" [85 Wn. 2d 307]; "have mastered the record, either by hearing the evidence, or reading the record or at the very least receiving briefs and hearing oral argument" [85 Wn. 2d 307].

After an exhaustive study of rules, regulations, treatises, administrative procedures, court cases, and college procedures, the Supreme Court pointed out that Bowing had conceded that the trustees would not be required to provide the contending parties with "findings and conclusions and proposal for decision" [85 Wn. 2d 307] because the trustees had read the record. The Court went on to state:

> It is unnecessary to serve upon the parties findings, conclusions and proposal for decision if the deciding officials have *either* heard or read the evidence.
>
> . . .
>
> This interpretation of the provision also is consistent with college's understanding of its duty as evidenced by its rule B12, promulgated as a part of its Policies and Procedures for Tenure and Dismissal, which were developed with faculty cooperation and approval. This rule does not provide for the board's issuance of a proposal for decision. Instead it requires the board to review the record of the hearing and to resubmit the case to the review commitee, if it disagrees with its findings and recommendation, and to obtain the benefit of its reconsideration of the matters in question before making a decision to overrule the committee. The apparent purpose of this procedural step is to make sure that the board will have thoroughly explored the matter before overruling the committee. 85 Wn. 2d 311

The Court also examined whether this interpretation would violate due process. In concluding that there would not be deprivation of due process, the Washington State Supreme Court quoted the U.S. Supreme Court as follows:

> In *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126 152, 85 L. Ed. 624, 61 S. Ct. 524 (1941):
>
> The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective. 85 Wn. 2d 313

The Supreme Court reversed the decision and sent it back to Superior Court for review of the college's dismissal order.

PART-TIME FACULTY: CONTRACT AND TENURE RIGHTS

McLachlan v. Tacoma Community College

14 Wn. App. 372, 541 P. 2d 1010 (1975)

Washington Court of Appeals District Two received an appeal to determine whether four instructors who were employed under part-time teaching contracts during the 1971-72 school year should be reclassified to full-time faculty with tenure rights.

Four part-time instructors filed a complaint against Tacoma Community College to obtain reclassification to full-time faculty status and tenure rights under RCW 28B.50.850-859. Superior Court for Thurston County dismissed their complaint. They appealed.

Two of the instructors, McLachlan and Wiseman, had been employed as full-time instructors for the 1970-71 school year under contracts in which they waived their tenure rights because they were temporary replacements for full-time instructors who were on sabbatical leave. They received part-time contracts for fall quarter 1971 and winter quarter 1972. They contended:

> . . . (1) They performed services during 1971-72 required of teachers with full-time faculty appointments but were paid only on a part-time basis as provided in their contracts; (2) the waiver provisions in their 1970-71 contracts should not be enforced for reasons of public policy; (3) they were not adequately notified of the district's decision not to renew their full-time contracts for the 1971-72 year; and (4) they were, therefore, entitled to the benefits of full-time contracts for 1971-72 as a matter of law. 14 Wn. App. 373

As full-time temporary instructors for one year, they were probationers under community college tenure laws. As such, they qualified for probationary evaluations and for notice of non-renewal of their contracts. The court cited an earlier case in which it held that a teacher subject to the continuing contract law could validly waive her right to reemployment, *Lande v. South Kitsap School Dist. 402*, 2 Wn. App. 468, 469 P. 2d 982 (1970). 14 Wn. App. 374

In *McLachlan v. Tacoma Community College*, the court could not conceive any public policy consideration that would prevent teachers from waiving advance notice of non-renewal, particularly when they knew they were temporary replacements for faculty who held tenured positions. The court held that they had validly waived their right to notice of non-renewal.

The issue of probationary evaluation was not seen the same way. The instructors were acknowledged to be "qualified and competent teachers who adequately performed professional functions incident to their employment." 14 Wn. App. 375. The court reasoned that the evaluation process could be significant because if the two teachers eventually achieved full-time status, they could receive credit for the one-year teaching assignment. Nothing indicated that the college wanted to deny them that credit. However, the court found no reason that they should not be able to waive their rights for a probationary evaluation. The court went on to conclude that the two instructors had validly waived their right to a probationary evaluation during 1970-71 and had completed one year of probationary teaching at the college.

The other two instructors, Adams and Shelley, were employed under part-time contracts during 1970-71 and taught more than 10 credit hours per quarter, with 15 hours being a full-time teaching load. The faculty agreement, which was negotiated at the end of that year, limited the number of hours a part-time teacher could teach to fewer than 10 hours. Two exceptions were sabbatical leave replacements and, for those who contracted for more than 10 hours in 1970-71, an extension of that ability for the 1971-72 year only.

All four taught classes under part-time contracts during the 1971-72 school year.

The Court of Appeals concluded:

> An instructor's contractual obligations under a full-time contract are distinctly different from and greater than an instructor's obligations under a part-time contract. None of the plaintiffs were contractually obligated to perform all the duties required of a full-time faculty appointee during the 1971-72 school year. 14 Wn. App. 377.

The lower court judgment was affirmed.

DENIAL OF TENURE: NO REASON GIVEN

Smith v. Greene

86 Wn. 2d 363, 545 P. 2d 550 (1976)

This Washington State Supreme Court case clarified that Spokane Community College District 17 trustees did not make errors in denying tenure to probationary faculty member, Dale Smith.

Five issues were brought out on appeal:

(1) Whether Smith had entitlement to the position,

(2) Whether the statuatory requirement of "reasonable consideration" meant that reasons must be given for a decision,

(3) Whether the trustees should have considered recommendations from the campus and district presidents,

(4) Whether the trustees' practice of considering tenure during the third year was appropriate, and

(5) Whether the letter from the district president was appropriate notification that tenure was denied. 86 Wn 2d 364

The board of trustees decided not to grant tenure to Smith. He brought suit against the district charging that errors were made in denying him tenure. The Superior Court for Spokane County yielded a summary judgment in favor of the college. Smith appealed that decision.

Dale Smith began employment with the district in September 1971 as a probationary faculty member. He had received three consecutive one-year contracts, was in his third year of probation, and had been evaluated each year. The tenure review committee had recommended him for tenure on two occasions. The board of trustees had a standing practice of considering tenure only in the third year. During winter quarter 1974, all reports and recommendations were forwarded to the board of trustees including recommendations for denial of tenure by campus and district

presidents, Snyder and Johnson, respectively. The presidents did not offer reasons for their recommendations. At their next regular meeting, the trustees considered all recommendations, heard comments from Smith and his supporters, then voted unanimously to deny tenure. They gave no reason. District president Johnson notified Smith in writing that "his employment contract would not be renewed for the 1974-75 school year or for any other ensuing year." 86 Wn. 2d 366.

1. Entitlement to position

The court cited *Perry v. Sindermann*, 408 U.S. 593, 602, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972) and *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972), in reasoning that an entitlement to a tenured faculty position might exist if there were practices and policies at the college which supported a legitimate claim to a "property interest." There was no support, in this court, for the view that a legitimate expectancy of tenure was created by a practice of usually adopting the review committee's recommendations on tenure. The court did not agree with Smith's assertion that the trustees' "reasonable consideration" of the review committee's recommendations, as required by RCW 28B.50.856, holds the trustees accountable and creates a statuatory "property interest." Instead, the court stated:

> We cannot agree. That section also states "the final decision to award or withhold tenure shall rest with the appointing authority [the trustees] . . ." RCW 28B.50.856. The final determination on tenure is thereby granted to the board of trustees regardless of committee recommendation. *Cf. Bowing v. Board of Trustees, supra* at 300. 86 Wn. 2d 369.

The court went on to point out:

> The tenure scheme of Community College District No. 17 is like that in *Burdeau v. Trustees of Calif. State Colleges*, 507 F. 2d 770 (9th Cir. 1974), where nothing in the state statutes or regulations of the college provided that reemployment was guaranteed if certain standards were met or recommendations made. The court stated, at page 774, "[u]ntil tenure is obtained [a faculty member] may equal or exceed minimum requirements for evaluation and still the school may prefer to employ someone else for the position he seeks." Under regulations similar to the statutory procedures here, nontenured faculty member was held to have no protectable property interest in reemployment. *Cusumano v. Ratchford*, 507 F 2d 980 (8th Cir. 1974), *cert. denied*, 423 U.S. 829, 46 L. Ed. 2d 46, 96 S. Ct. 48 (1975). 86 Wn. 2d 369

The court could not find in the laws or in the practices of the college, any reason for expectation of continued employment.

2. Reasonable Consideration

Smith contended that the language "reasonable consideration" meant that trustees were required to give reasons for their tenure decisions. The court found the meaning to be vague but took the view that if the legislature wanted the trustees to give reasons for their decision, explicit language would have been used.

3. Presidents' Recommendations

Smith asserted that the campus and district presidents' recommendations were unauthorized. The court cited WAC 132Q-88-070(1) which called for the campus

president to make a recommendation. With regard to the district president's recommendation, the court stated:

> The district president need not locate explicit authority in a statute or regulation before he takes any action or writes a letter. 86 Wn. 2d 372

4. Considering Tenure During the Third Year

Smith argued that the trustees' practice of considering tenure only in the third year violated the law. The court pointed out that:

> RCW 28B.50.852 does not create a statutory right to tenure consideration "at any time" during the probationary period. The section is clear and unambiguous. *See Roza Irrigation Dist. v. State*, 80 Wn. 2d 633, 635, 497 P. 2d 166 (1972). "[T]enure may be awarded at any time *as may be determined by the appointing authority* [the trustees] . . ." as long as the probationary period does not exceed three consecutive regular college years. (Italics ours.) RCW 28B.50.852. The practice of the district comports with the statutory language. 86 Wn. 2d 374

5. The President's Letter

Smith contended that the letter he received did not comply with the district's regulations because the word "tenure" was not used. The court held that Smith knew the meaning of the board's action and that the letter sent to him by the district president was adequate notice that tenure had been denied.

The Supreme Court of Washington affirmed the order of summary judgment.

TERMINATION: TENURE PROCEDURES INAPPLICABLE

Rutcosky v. Board of Trustees
14 Wn. App. 786, 545 P. 2d 567 (1976)

Washington Court of Appeals Division Three rendered a judgment that Big Bend Community College did not breach an employment contract and wrongfully terminated Roger Rutcosky.

Superior Court for Spokane County heard Rutcosky's complaint and made a decision in favor of the college. Mr. Rutcosky appealed.

Mr. Rutcosky was employed by Big Bend Community College from 1970 until June 30, 1972 in teacher and counselor probationary faculty positions. His probationary faculty status ended on June 30, 1972. His employment was to continue for another year in an administrative appointment but he was fired on this same date for misconduct. Almost one year elapsed before he sought judicial review of his dismissal on June 18, 1973.

The court reasoned that this was a contested case in which a request for a formal hearing was to be directed to the college president within 10 days of the "notice of the final decision." 14 Wn. App. 788. There was no timely request for a formal hearing. The court decided that the time limit was "mandatory and jurisdictional" and barred further administrative and judicial review.

Mr. Rutcosky blamed the college for not initiating a hearing within the required time limits, citing the laws related to faculty dismissal. The court held that he was not dismissed as a faculty member because his faculty contract ended the day he was terminated. Therefore, faculty dismissal procedures were inapplicable.

The Superior Court judgment was affirmed. A petition for rehearing was denied as was a review by the Supreme Court.

MANDATORY RETIREMENT: VOLUNTARY RESIGNATION

Elliot v. Board of Trustees
29 Wn. App. 890, 631 P. 2d 985 (1981)

Washington Court of Appeals Division One addressed the question whether a formerly tenured faculty member was wrongfully discharged under an unconstitutional mandatory retirement policy while a teaching contract was in effect.

Superior Court for King County granted a summary judgment in favor of Highline Community College because the retirement policy was constitutional; no employment contract was in effect; and Elliot's resignation was voluntary. Elliot appealed.

Ray Elliot was employed as a welding instructor, received tenure in 1970, and became 65 years old on December 14, 1974. A retirement policy was in effect which required

teachers to retire at the end of the year in which they reached age 65. The policy allowed one year extensions beyond this up to age 70. Mr. Elliot was granted two one-year extensions, then a summer contract. He submitted a resignation effective the end of summer quarter but informed the college that he would stay on until a replacement was found. He had a heart attack in July. The 1977 fall quarter schedule listed him as a welding instructor. A replacement welding instructor was hired before fall quarter classes began. Elliot initiated this suit when he learned that the college would not allow him convalescent sick leave.

In finding that the college's mandatory retirement policy was not unconstitutional, the court stated:

> Most state and federal courts which have considered mandatory retirement for teachers and other educational employees have found it to be constitutional. *See e.g., Lamb v. Scripps College*, 627 F. 2d 1015 (9th Cir. 1980); *Fulton County School Dist. v. Sanders*, 242 Ga. 298, 248 S.E. 2d 670 (1978); *Palmer v. Ticcione*, 433 F. Supp. 653 (E.D.N.Y. 1977), *cert. denied*, 440 U.S. 945, 59 L. Ed. 2d 633, 99 S. Ct. 1421 (1979); *Klain v. Pennsylvania State Univ.* 434 F. Supp. 571 (M.D. Pa. 1977); *Fazekas v. University of Houston*, 565 S.W. 2d 299 (Tex. Civ. App. 1978). *See generally* Annot. 81 A.L.R. 3d 811 (1977). We find these cases to be persuasive. 29. Wn. App. 893

Elliot claimed that he had a contract to teach in the 1977-78 school year. The court found that he had offered to teach during that year and the college thanked him for the offer but there was no evidence that his offer had been accepted. The court found the possibility of a part-time contract to teach during fall quarter 1977 but Elliot was absent on the first day of class.

The Superior Court judgment was affirmed except for the existence and terms of a part-time contract which were remanded.

DENIAL OF TENURE: DECLINING ENROLLMENT

Causey v. Board of Trustees
30 Wn. App. 649, 638 P. 2d 98 (1981)

In this case, Washington Court of Appeals Division One upheld Everett Community College Board of Trustees' decision to deny tenure to a probationary art instructor primarily because of declining enrollment.

The board of trustees voted unanimously to deny tenure. Causey and his union sued. A summary judgment was rendered by the Superior Court of Snohomish County in favor of the trustees. Causey appealed.

Charles Causey was employed to teach art and had received three consecutive one-year probationary teaching contracts. His tenure review committee was informal, did not meet as required by statute, and changed membership during the second and third years of his probation. There was no formal observation of his teaching by committee members. During the last year of probation, the committee recommended denial of tenure on the basis of evaluations of his teaching and personal

observations, but primarily because of the art department's declining enrollment. The board of trustees considered the evaluations and tenure review committee recommendations then voted unanimously to deny tenure.

The Court of Appeals reviewed the entire record and concluded that the board had acted properly. In concluding that the board could deny tenure without cause, the court stated:

> In reaching a tenure decision, the board of trustees does not have to state either the evidence relied on or the reasons for the decision. *See Smith v. Greene*, 86 Wn. 2d 363, 369, 545 P. 2d 550 (1976). The board alone makes the final tenure decision after giving reasonable consideration to the recommendations of the tenure review committee. RCW 28B.50.856.
>
> . . .
>
> Mr. Causey's only expectation under his probationary faculty appointment was that he could teach until his contract expired on June 12, 1979.
>
> . . . the numerous procedural errors committed by Causey's tenure review committee were regrettable; however, such errors could not mandate a grant of tenure to Causey. *See Smith v. Greene, supra* at 375; *Nzomo v. Vermont State Colleges*, 138 Vt. 73, 411 A. 2d 1366 (1980). The board alone had the authority to make final tenure decisions. RCW 28B.50.856. 30 Wn. App. 652, 653

Reconsideration was denied and a review by the Washington State Supreme Court was denied.

TENURED FACULTY LAYOFFS: FINANCIAL EMERGENCY

Washington Education Association v. State
97 Wn. 2d 899, 652 P. 2d 1347 (1982)

This case was an original action before the Washington State Supreme Court, under RAP 16.2, which sought to invalidate Substitute House Bill 782 (SHB 782) which created procedures for terminating community college faculty during financial emergencies.

The Supreme Court concluded that challenges to the law lacked merit and denied the relief requested.

SHB 782 was passed by the Legislature on December 2, 1981, and became effective December 21, 1981. The State Board for Community College Education (SBCCE) declared a financial emergency on January 21, 1982. Skagit Valley College (SVC), which was engaged in a reduction in force, switched from using a collective bargaining agreement to using procedures in SHB 782. Layoff notices were sent to three tenured faculty members. Dismissal hearings were conducted during this case.

The Supreme Court decided to hear this case as an original action after the faculty had filed a Petition for Mandamus, Prohibition and Declaratory Judgment along with a Petition for Original Jurisdiction for Mandamus, Prohibition, Declaratory Relief, and Stay of Proceeding.

The faculty contended that SHB 782 made extreme changes to existing laws and contracts. SVC and SBCCE argued that the new law was supplemental and provided uniform procedures for implementing layoffs during financial emergencies

SHB 782 procedures took effect only when the Governor or the Legislature reduced appropriations and SBCCE declared a financial emergency. The law did not cover any other faculty dismissal. The most significant changes made by SHB 782 were the use of a hearing officer rather than the tenure review committee and limited the hearing to a determination that the named faculty were the "proper ones to be terminated."

In addressing the faculty concern that SHB 782 was incomplete in that it could not be understood without referring to other laws, the Court stated:

> SHB 782 is, in this respect, what has been termed a "reference" statute, the object of which is to incorporate provisions of other acts by reference. *Steele v. State*, 85 Wn. 2d 585, 537 P. 2d 782 (1975). SHB 782 seems to pass the first part of the *Washington Educ. Ass'n* test. A faculty member subject to the RIF dismissals which are the subject of SHB 782 is fully apprised by the bill of his/her rights and the process to be afforded. 97 Wn. 2d 904
>
> . . .
>
> Undoubtedly, modification of existing laws by a complete statute renders the existing law by itself "erroneous" in a certain sense. . . . Nonetheless, SHB 782 will be codified with RCW 28B.50 and its modification of the existing statute should be apparent . . . . The purpose of SHB 782 is not hidden and, to the extent it fails to articulate how it relates to the rest of RCW 28B.50, its infirmities are not of constitutional magnitude. 97 Wn. 2d 906

The faculty claimed that the title of SHB 782 was too broad and had the effect of hiding changes to bargaining agreements, due process rights, and tenure rights. The Court cited *Flanders v. Morris*, 88 Wn. 2d 188 (1977) pointed out that the Supreme Court frequently held that the title of a law did not have to index the contents.

Another faculty contention was that by changing processes called for in its bargaining agreement, SHB 782:

> . . . violates article 1, section 23 of the Washington State Constitution, which provides: "No . . . law impairing the obligations of contracts shall ever be passed." Respondents argue RCW 28B.52.035 authorizes such a modification and that the statute is an implicit limitation on petitioners' contractual rights 97 Wn. 2d 907.

The Court responded:

> In *Ketcham v. King Cy. Med. Serv. Corp.*, 81 Wn. 2d 565, 570, 502 P. 2d 1197 (1972), we stated: Neither the due process clause nor the impairment of contract clause of either constitution overrides the power of the state to establish regulations that are reasonably necessary to secure the health safety, good order, comfort or general welfare of the community. 97 Wn. 2d 907.

The faculty claimed that SHB 782 deprived them of a property right and the right of due process for protecting the property right. The issue here was whether the process under SHB 782 was adequate. The Court reasoned that procedures contained in SHB 782 provided minimum due process.

The faculty asserted that SHB 782 treated community college faculty different from other college and university faculty, therefore it violated equal protection. SVC

and SBCCE argued that community colleges were governed by separate statutes from other institutions and that there was no common tenure law. The Court held that:

> SHB 782 is a reasonable legislative response to the existing community college tenure provisions and the current financial crisis. . . . The constitution does not require the Legislature to provide uniform laws regarding tenure for all colleges. *Dandridge v. Williams*, 397 U.S. 471, 485, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970). 97 Wn. App. 912.

The Washington State Supreme Court affirmed the constitutionality of SHB 782.

DENIAL OF TENURE: PROBATIONARY PERIOD EXTENDED

Eyre v. Big Bend Community College

36 Wn. App. 154, 672 P. 2d 1270 (1983)

Washington Court of Appeals Division Three decided that an arbitrator could extend the probationary period of a faculty member who was denied tenure. The college had not followed contractual evaluation procedures for probationary faculty.

The board of trustees denied tenure to Donald Eyre. An arbitrator extended the probationary period for one year. The college sought judicial review and Superior Court for Grant County vacated the arbitration award. Eyre appealed.

The tenure review committee gave satisfactory performance ratings during the first two years of Mr. Eyre's probationary period but during the third year, without stating reasons, recommended that he not be awarded tenure. The board denied tenure. Mr. Eyre filed a grievance and, in the final stages, the college refused to arbitrate. Eyre obtained a court order for arbitration. The arbitrator found the college did not follow the evaluation procedures and criticisms of Eyre could not be substantiated. He ordered a one-year reinstatement, during which tenure evaluations would take place.

The arbitrator's decision was vacated in superior court. Eyre contended that reinstatement was the only solution available to the arbitrator who found the college had violated tenure evaluation procedures. The college argued that the board of trustees had the exclusive authority to decide whether faculty contracts would be renewed. The college asserted that the arbitrator violated state law and exceeded his authority under the bargaining agreement. The Court of Appeals disagreed.

The court agreed that tenure decisions belong to the board of trustees but pointed out that an arbitrator might arrive at solutions that would not take away the board's authority. In this case, the solution formulated by the arbitrator did not take away the board's authority, it merely required that the board follow the collective bargaining agreement. The court would not allow the college to breach the faculty contract, which would leave no remedy for Mr. Eyre:

> Thus, we find the arbitrator fashioned a remedy "appropriate with the seriousness of the contractual violation and the circumstances." *North Beach*, at 85 and the court erred in setting it aside. 36 Wn. App. 158, 159.

In finding that this was not an unusual remedy, the court stated:

> Other jurisdictions faced with similar circumstances have consistently held reinstatement of a teacher to probationary status until evaluation procedures have been complied with is within the scope of the arbitrator's authority. *See Lisbon Sch. Comm. v. Lisbon Educ. Ass'n*, 438 A.2d 239 (Me. 1981); *School Comm. v. Korbut*, 373 Mass. 788, 369 N.E. 2d 1148 (1977); *School Comm. v. Tyman* 372 Mass. 106, 360 N.E. 2d 877 (1977); *United Liverpool Faculty Ass'n v. Board of Educ.*,52 N.Y. 2d 1038, 420 N.E. 2d 386, 438 N.Y.S. 2d 505 (1981); *North Syracuse Cent. Sch. Dist. v. North Syracuse Educ. Ass'n*, 45 N.Y. 2d 195, 379 N.E. 2d 1193, 408 N.Y.S. 2d 64 (1978); *Board of Educ. v. Bellmore-Merrick United Secondary Teachers, Inc.*, 39 N.Y. 2d 167, 347 N.E. 2d 603, 383 N.Y.S. 2d 242 (1976); *Cohoes City Sch. Dist. v. Cohoes Teachers Ass'n*, 40 N.Y. 2d 774, 358 N.E. 2d 878, 390 N.Y.S. 2d 53 (1976); *Northeast Cent. Sch. Dist. v. Webutuck Teachers Ass'n*, 71 A.D. 2d 673, 418 N.Y.S. 2d 952 (1979); *Board of Educ. v. Yonkers Fed'n of Teachers*, 58 A.D. 2d 626, 395 N.Y.S. 2d 690 (1977); *Board of Educ. v. Chautauqua Cent. Sch. Teachers Ass'n*, 41 A.D. 2d 47, 341 N.Y.S. 2d 690 (1973); *Central Point Sch. Dist. 6 v. Employment Relations Bd.*, 27 Or. App. 285, 555 P. 2d 1269 (1976); *Fries v. Wessington Sch. Dist. 2-4*, 307 N.W. 2d 875 (S.D. 1981). *But see Illinois Educ. Ass'n Local Comm. High Sch. Dist. 218 v. Board of Educ.* 62 Ill. 2d 127, 340 N.E. 2d 7 (1975). 36 Wn. App. 159

The court concluded that evaluation procedures called for in the faculty negotiated agreement would had to have been followed before the board made its final decision on tenure. The Superior Court decision was reversed and orders were given to implement the arbitrator's decision.

TENURED FACULTY LAYOFF: BUDGET REDUCTION

Keppler v. Board of Trustees

38 Wn. App. 729, 688 P. 2d 512 (1984)

Washington Court of Appeals Division Three provided judicial review of a Chelan County case to determine whether the layoff of a tenured agriculture instructor was appropriate action under a Wenatchee Valley College budget reduction plan.

Dr. Keppler, the tenured faculty member, requested judicial review of his layoff. The Superior Court for Chelan County affirmed the layoff. Keppler appealed.

The board of trustees, in January 1981, declared a financial emergency and a need for reduction in force. The board then adopted a comprehensive educational services plan for 1981-82. Among other things, the plan eliminated the agriculture program of instruction and added a tree fruit production program. The college president notified Keppler that he would be on layoff at the end of the school year.

The college had previously implemented an austerity budget which eliminated administrators, classified staff, part-time instructors, summer school, and other college operating expenses. The proposed funding allocation for the following year could only be met with a budget that included reductions in full-time teaching positions.

A new tree fruit production program was being developed at the time of the hearing. In Keppler's analysis, the new courses being developed were similar to those he had been teaching in past years. The dean of instruction and associate dean of occupational education asserted that the courses were significantly different. Instructor qualifications had not yet been decided. The college president indicated that Keppler would have a right of first refusal if he met the instructor qualifications.

The hearing officer concluded that Keppler was properly laid off and recommended that he be reinstated when the new program begins. The board of trustees affirmed Keppler's layoff without any qualification for reinstatement.

Dr. Keppler claimed that the board's decision was clearly erroneous. The court did not agree:

> The test for determining whether a decision is clearly erroneous is whether the reviewing court is firmly convinced that a mistake has been committed even though there may be some evidence supporting the decision or order. *Ancheta v. Daly*, 77 Wn 2d 255, 259-60, 461 P.2d 531 (1969) (applying the clearly erroneous standard under RCW 34.04, the administrative procedure act). However, the clearly erroneous standard of review does *not* authorize a court to substitute its judgment in factual matters for that of an administrative agency. The mere fact there exists credible evidence contrary to the tribunal's findings is not sufficient by itself to label those findings clearly erroneous. *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn. 2d 317, 325, 646 P. 2d 113 (1982), *cert. denied*, 459 U.S. 1106 (1983). 38 Wn. App. 732.

The court found Keppler's argument of a balanced 1981-82 budget to be a circular argument. For example, the budget was balanced but reinstating his program would

cause an imbalance which would cause the program to be eliminated, ad infinitum. The court found evidence in the record which supported a finding that the college needed to cut programs for 1981-82. The court indicated that the Agriculture Advisory Committee's report was sufficient to support a low priority for the agriculture program and a high priority for a new tree fruit production program. The court did not accept Keppler's argument that the board's reliance on that report was impermissible. The court rejected Keppler's argument that the board's decision was clearly erroneous.

Dr. Keppler asserted that his due process rights had been violated in that the change in programs was no more than a change in the name of the program. The court indicated that the board's acceptance of the deans' opinions about the nature of the new courses was not "unreasoning" just because Keppler disagreed with the opinions. In the court's opinion, the board had complied with due process.

The Court of Appeals affirmed the Superior Court decision.

WASHINGTON STATE FOUR-YEAR COLLEGE AND UNIVERSITY CASES

LOYALTY OATH: RIGHT TO A HEARING

Nostrand v. Little

58 Wn. 2d 111, 361 P. 2d 551. (1961)

The Washington State Supreme Court was ordered by the U.S. Supreme Court to vacate an earlier decision and to reconsider whether two tenured University of Washington professors had a right to a hearing before being discharged. They had refused to sign a loyalty oath as required by Washington State's subversive activities act.

This case was originally appealed to the Washington State Supreme Court from a judgment of the Superior Court for Thurston County which prevented the regents from enforcing the act and from requiring the professors to take the oath. The

Washington State Supreme Court reversed the decision and the professors appealed to the Supreme Court of the United States. The U.S. Supreme Court directed the Washington State Supreme Court to vacate its prior judgment and to reconsider the case.

Facts shown in the record were that two full professors, who had never refused to take the oath, were employed under contract by the University of Washington. Through their employment contracts, state statutes and rules and regulations of the university, they had tenure rights. The regents had demanded that the professors sign and swear to a loyalty oath as required by Washington State's subversive activities act. Unless the professors complied with the demand, their employment contracts with the university would be terminated.

The Court provided lengthy analyses of prior actions in this case and, of related cases, then reasoned that:

> Instead of being called in by his superior and being asked orally if he belongs to a subversive organization, the legislature has adopted the policy of asking each public employee to state in writing, *i.e*, by affidavit, whether he is at that time a member of such an organization. If he signs the affidavit, that is the end of the matter. If he declines to sign, the employee is subject to immediate discharge. If he has no tenure rights, he has no vested right to public employment, and the act affords him due process. *Nelson v. County of Los Angeles*, 362 U.S. 1, 4 L. Ed. (2d) 494, 80 S. Ct. 527. On the other hand, if he has tenure rights, he must be accorded such a hearing as his contract of employment calls for. 58 Wn. 2d 125.

The professors in this case had tenure rights and the court briefly outlined those rights as being:

> . . . the right to be given written notice of the alleged grounds for his discharge from his position, a "trial" before a standing committee composed of eleven members of the faculty known as the tenure committee, the right to be represented by any person of his choice, the right to be present during the taking of testimony, to call witnesses, and to cross-examine opposing witnesses.
>
> . . .
>
> A professor may be removed from his position only "for cause," which is defined as one or more of the following reasons: (1) Incompetence, (2) neglect of duty, (3) physical or mental incapacity, (4) dishonesty or immorality, (5) conviction of a felony.
>
> The president, after reviewing the findings and recommendations of the tenure committee, makes his decision as to whether or not a cause for removal has been established in a particular case and reports to the regents. 58 Wn. 2d 130, 131.

Since they were tenured faculty, the Court reasoned that they were not entitled to a hearing under the state subversive activity act. In the Court's opinion:

> . . . before they can be discharged for such refusal, the professors, under their contract of employment, are entitled to a hearing before the tenure committee conducted in the manner prescribed in the applicable rules and regulations adopted by the regents (see appendix) for the termination of the tenure of full professors employed by the University of Washington. 58 Wn. 2d 132,133.

The Court went on to say that in all other matters, it adhered to its original opinion. This latest judgment was also appealed to the U.S. Supreme Court as described in the following case.

LOYALTY OATH: LACK OF FEDERAL QUESTION

Nostrand v. Little

368 U.S. 436, 7 L.Ed 2d 426, 82 S.Ct. 464 (1962)

A Washington State Supreme Court decision which held that two University of Washington tenured professors were entitled to a hearing before being discharged was appealed to the U.S. Supreme Court.

Initially, the Washington State Supreme Court upheld the validity of a state statute requiring every public employee to take a loyalty oath and held that refusal to do so would be cause for immediate dismissal. On appeal, the U.S. Supreme Court vacated the state court's judgment and remanded the case for determination whether, under state statutes, the tenured teachers were entitled to a hearing before being discharged. The Washington Supreme Court answered the question in the affirmative. This latest decision of the the Washington Supreme Court was appealed.

The United States Supreme Court dismissed this appeal for want of a substantial federal question.

LOSS OF TENURE: SEXUAL MISCONDUCT

Lehman v. Board of Trustees
89 Wn. 2d 874, 576 P. 2d 397 (1978)

The Washington State Supreme Court decided that a private college did not violate due process and faculty contract rights of a tenured professor who had been dismissed for cause.

Donald Lehman sued for reinstatement and for $2 million damages for libel and damage to his professional standing. The Superior Court for Walla Walla County made a judgment in favor of the school. Lehman appealed.

Two female students reported that the professor had made several advances toward them. A similar charge had been made a year earlier. The professor had been cautioned by the acting college president to be extremely careful in his dealings with female students. The acting president held a meeting with the professor and the dean of faculty, then wrote to the professor outlining charges of sexual advances to students, teaching deficiencies, and improper behavior with respect to faculty members and college administration. The professor was suspended immediately with pay, pending proceedings.

An investigatory committee of five senior faculty members, appointed in accordance with the faculty code, held 21 sessions and heard testimony from 20 persons. The

committee recommended pursuit of dismissal proceedings. The charges were referred to the academic council in accordance with the faculty code. The professor made a written response to the charges. He asserted that he could recall no instances of sexual misconduct but indicated that he had an alcohol problem which caused lapses of memory and that such conduct could have occurred during these lapses. He claimed that he had sought professional help and had stopped drinking. He denied or made excuses for other charges. The academic council held hearings for 9 days and found that the professor did in fact engage in acts of sexual misconduct. The council recommended dismissal with one year's severance pay. The board of trustees dismissed the professor and continued monthly salary payments for one year providing no publicity or legal action was initiated by the professor. The professor sued for libel and damage to his professional standing. When he sued, his salary was terminated.

The Superior Court concluded that the board of trustees had adopted the 1940 Statement of Principles on Academic Freedom and Tenure and the 1958 Statement on Procedural Standards in Faculty Dismissal Proceedings, both as adopted by the American Association of University Professors (AAUP). The court also concluded that the board of trustees had properly followed AAUP procedural standards. The Supreme Court concluded that private action was immune from the restrictions of the Fourteenth Amendment. Nothing could be found in the record that pointed to a "state action" on the part of Whitman College, a private institution. The Superior Court judgment was affirmed in all respects.

DENIAL OF TENURE: CONSPIRACY NOT ESTABLISHED

Allard v. Board of Regents

25 Wn. App. 243, 606 P. 2d 280 (1980)

Washington Court of Appeals Division One faced two questions in this case: (1) whether a University of Washington faculty member was denied tenure because of a conspiracy in which other faculty agreed to disregard his teaching ability while considering him for tenure, and (2) whether defective due process procedures were employed in considering his promotion and tenure.

The Superior Court for King County granted a summary judgment in favor of the University. The faculty member appealed.

The faculty member, Francis Allard, was reviewed for tenure according to procedures in the Faculty Code of the University of Washington Handbook. Department faculty met and voted to recommend denying tenure on the ground that his scholarly work was inadequate. The recommendation went to the Dean who concurred.

Allard appealed to the University tenure committee on the ground that procedural defects had occurred during consideration of his tenure. An evidentiary hearing was not held because the tenure committee had assumed the truth of Allard's allegations, then concluded that no violation had occurred. Allard appealed this decision to the university president who affirmed. The president's decision was appealed to the

Board of Regents who also affirmed. This final decision was filed on July 31, 1975. The next action was commenced on June 10, 1977.

The trial court found that it was not authorized to act on the procedural steps because the State Higher Education Administrative Procedure Act required a petition to be filed in superior court within 30 days of service of the final decision. The trial court concluded that the claim was not timely filed, thus it had no jurisdiction on the due process claim. The Appeals Court found that this judgment was proper. The Appeals Court also concluded that the trial court made a proper judgment in rejecting the claim of conspiracy because Allard did not show factual evidence of an agreement among faculty members to disregard his teaching ability in considering him for tenure. The court stated that if an agreement was not provided, a conspiracy could not be established.

LOSS OF TENURE: INSUBORDINATION

Stastny v. Board of Trustees
32 Wn. App. 239, 647 P. 2d 496 (1982)

In *Stastny v. Board of Trustees*, the Washington State Court of Appeals decided that a tenured faculty member could be terminated for insubordination after he

ignored a dean's denial of his request to be absent from classes, carried out his travel plans, and was absent the first six days of the quarter.

The board of trustees terminated Charles Stastny after a dismissal hearing. The board's decision was upheld by the Superior Court for Kittitas County. Stastny appealed the decision and raised constitutional questions about academic freedom, equal protection, the faculty code being vague and overbroad, and the penalty of dismissal being excessive punishment.

Stastny had been hired as an assistant professor. Three years later he was granted tenure and promoted to associate professor. During the next several years he was granted the following leaves: 1969-70, two quarters leave without pay; 1971-72, leave without pay while teaching at another college; 1973-74, the entire year on sabbatical leave; 1975, approved leave while attending two meetings, one in Toronto and another in Chicago; 1976, February through spring quarter, disability leave for convalescence; 1978, requested leave to receive a grant to work at Harvard, leave was approved "with prejudice." Several unapproved leaves were in his record: January 1973, two days late returning from India; November 1974, returned late from trips to Mexico and Chicago; November 1975, unauthorized cancellation of a class; January 1977, one day late starting spring quarter; October 1978, unauthorized cancellation of a class and leaving campus. The associate professor's pay had been docked for absences and his colleagues had voted to censure him. The censure was removed from his file. The dean talked with him about his attendance. December 5, 1978, Stastny formally requested approval to deliver a lecture at a seminar in

Jerusalem on January 8 or 9, 1979. The next day, the department chair authorized him to be absent for two registration days and two class days, until noon on January 8, 1979. The day after that, Stastny requested approval until 10 a.m. January 9, 1979, because he could not change his travel plans. This request was referred to the dean who reviewed prior absences and denied his request in writing. After a meeting with the university president, vice-president, and Stastny, the dean wrote another letter stating that his request had been denied and that if the directive was ignored, disciplinary action would be initiated. Statsny asked for another review by the president and indicated he would initiate grievance procedures if his request was not granted. He left for Israel before receiving a response from the president. He wrote a letter to the dean from Israel, stating that he would return to the university late on January 9, 1979. Stastny's classes were then canceled. He returned on January 10. The president, vice-president, dean and division chair met with him on January 15 so he could explain his absence. A few days later, the president informed Stastny that he would recommend dismissal "for insubordination, grievous and willful violation of published university rules, and gross misconduct." 32 Wn. App. 244. All colleagues in his department recommended that he be terminated. Finally, his employment was terminated by the board of trustees.

The faculty code allowed termination of a tenured faculty member for sufficient cause and listed insubordination as one of the sufficient causes.

The Appellate Court agreed with the board's findings relative to establishing insubordination as a basis for termination. The court stated:

> "Insubordination" has been defined as the willful refusal of a teacher to obey the reasonable rules and regulations of the board of education, Annot., *What Constitutes "Insubordination" as Grounds for Dismissal of Public School Teacher*, 78 A.L. R. 3d 83 § 3 at 90 (1977); *State Tenure Comm'n v. Madison Cy. Bd. of Educ.* 282 Ala. 658, 213 So. 2d 823 (1968); *State ex rel. Steele v. Board of Educ.* 252 Ala. 254, 40 So. 2d 689 (1949); *Board of Educ. v. Swan*, 41 Cal. 2d 546, 261 (1953), *cert. denied*, 347 U.S. 937, 98 L. Ed. 1087, 74 S. Ct. 627 (1954), or disobedience of orders, or direction, with a general disaffected attitude toward authority. *Coleman v. State*, 189 So. 2d 415 (Fla. Dist. Ct. App. 1966); *State ex rel. Richardson v. Board of Regents*, 70 Nev. 347, 269 P. 2d 265 (1954). Insubordination may consist of a persistent course of willful defiance in refusing to obey a reasonable direct or implied order given by proper authority. *Board of Trustees v. Cowell*, 611 P. 2d 427 (Wyo. 1980); *Ray v. Minneapolis Bd. of Educ.* 295 Minn. 13, 202 N.W. 2d 375 (1972). In those cases where insubordination was charged due to an absence by the teacher and the teacher had notified the proper authorities of the proposed absence and approval of such was expressly denied, the dismissals for insubordination were affirmed. *See Fernald v. Ellsworth Superintendent Sch. Comm.*, 342 A. 2d 704, 78 A.L.R. 3d 108 (Me. 1975); *Johnson v. United Sch. Dist. Joint Sch. Bd.*, 201 Pa. Super. 375, 191 A. 2d 897 (1963). 32 Wn. App. 247, 248

In considering the professor's contention that his academic freedom had been violated, the court pointed out:

> Academic freedom is not a license for activity at variance with job related procedures and requirements, nor does it encompass activities which are internally destructive to the proper function of the university or disruptive to the education process. *See Pickering v. Board of Educ.*, 391 U.S. 563, 572, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968); *Roseman v. Indiana Univ.* 520 F. 2d 1364 (3d Cir. 1975) *cert. denied*, 424 U.S. 921, 47 L. Ed. 2d 329 96 S. Ct. 1128 (1976); *Clark v. Holmes*, 474 F. 2d 928, 931 (7th Cir. 1972); *Keddie v. Pennsylvania State Univ.*, 412 F. Supp. 1264, 1270 (M.D. Pa. 1976). Teachers may not leave their classrooms unattended in order to exercise the right of free expression, as schools and classes cannot be conducted without someone being in charge. *Graves v. Walton Cy. Bd. of Educ.* 300 F. Supp. 188, 194 (M.D. Ga. *Walton Cy. Bd. of Educ.* 300 F. Supp. 188, 194 (M.D. Ga. 1968), *aff'd*, 410 F. 2d 1153 (5th Cir. 1969). 32 Wn. App. 249, 250

The court went on to describe academic freedom:

> The right of academic freedom, like all other constitutional rights, is not an absolute. *Moore v. Gaston Cy. Bd. of Educ.* 357 F. Supp. 1037, 1040 (W.D.N.C. 1973). There must be a weighing of the respective interests involved. *Konigsberg v. State Bar*, 366 U.S. 36, 51, 6 L. Ed. 2d 105, 81 S. Ct. 997 (1961). It has been said that First Amendment rights of teachers must be balanced with those of the State in assuring "orderly school administration." *Pickering v. Board of Educ. supra.* State interests may limit the right of a university professor to say and do as he pleases. *Keddie v. Pennsylvania State Univ., supra* at 1270. For example: (1) The need to maintain harmony among coworkers; (2) the need to curtail conduct impeding the teacher's proper and competent performance of his daily duties; (3) the need to prevent activities disruptive of the educational process and to provide for the orderly functioning of the university. *See Roseman v. Indiana Univ. supra; Htrick v. Martin*, 480 F. 2d 705 (6th Cir. 1973); *Simard v. Board of Educ.* 473 F. 2d 988 (2d Cir. 1973); *Clark v. Holmes, supra* at 931-32;*Knarr v. Board of Sch. Trustees*, 317 F. Supp. 832 (N.D. Ind. 1970), *aff'd* 452 F. 2d 649 (7th Cir. 1971); *Johnson v. Branch*, 364 F. 2d 177 (4th Cir. 1966); *Robbins v. Board of Educ.* 313 F. Supp. 642, 645, 647 (N.D. Ill. 1970); *Keddie v. Pennsylvania State Univ., supra* at 1271. 32 Wn. App. 250, 251

The court found that Stastny "had not been treated unfairly or differently from others." 32 Wn. App. 252. Therefore, there was no violation of the equal protection clause of the Fourteenth Amendment.

The question of vagueness revolved around the definition of the term "insubordination." The court reasoned that the term be given its common meaning:

> . . . the general ordinary meaning of insubordination is defiance or disobedience to authority and the refusal to obey orders. *Webster's Third New International Dictionary* 1172 (3d ed. 1969); 5 *Oxford English Dictionary* I-358 (1970). Here, after proper authorities repeatedly denied Professor Stastny's request for approval of his proposed absence to Israel and

> warned of disciplinary action if he did go, he went anyway. He cannot now claim the word "insubordination", as used in the faculty code, section 3.72 (A), is so vague he could not reasonably understand his contemplated conduct would be "insubordination" which was a ground for dismissal under the code. 32 Wn. App. 253

With respect to the question of overbreadth, the court reasoned:

> "Overbreadth" addresses the question of substantive due process, *i.e.*, whether the statute is so broad it may not only prohibit unprotected behavior, but also constitutionally protected activity as well. *Grayned v. Rockford*, 408 U.S. 104, 114, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972); *United States v. Robel*, 389 U.S. 258, 19 L. Ed. 2d 508, 88 S. Ct. 419 (1967); *Blondheim v. State*, 84 Wn. 2d 874, 878, 529 P. 2d 1096 (1975). Where pure speech is involved, the traditional rules of standing have been altered to allow attacks on overly broad statutes without requiring the person making the attack to demonstrate his own rights of free expression have been violated. *Broadrick v. Oklahoma*, 413 U.S. at 612; *Gooding v. Wilson*, 405 U.S. 518, 521, 31 L. Ed. 2d 408, 92 S. Ct. 1103 (1972). However, where more than pure speech is involved, a person does not have standing to challenge a statute on the basis of overbreadth for the benefit of others. *Broadrick v. Oklahoma*, *supra* at 612.
>
> Here, contrary to Professor Stastny's position, the Board's findings and conclusions clearly state Professor Stastny's unauthorized absence from his assigned campus responsibilities was the reason for his dismissal. No mention is made of letters. This unapproved absence was conduct, not speech, therefore Professor Stastny has no standing to challenge the faculty code provisions for overbreadth for the alleged benefit of others. 32 Wn. App. 254, 255

Finally, the court found that termination of his employment was not excessive punishment because prior warnings and salary deductions had not been effective with him. The board's decision to terminate him was affirmed. Reconsideration was denied by the Appellate Court and a review by the Washington State Supreme Court was also denied.

DENIAL OF TENURE: SEX DISCRIMINATION NOT ESTABLISHED

Amoss v. University of Washington

40 Wn. App. 666, 700 P. 2d 350 (1985)

In this case, Washington Court of Appeals decided that a female assistant professor of anthropology was not denied tenure because of sex discrimination and the University of Washington Board of Regents was not bound by recommendations made by her tenure committee.

The board of regents denied tenure for assistant professor of anthropology, Dr. Pamela Amoss. King County Superior Court upheld the decision. Dr. Amoss appealed, raising questions of sex discrimination and procedural errors.

Dr. Amoss began her tenure-track employment with the University of Washington in fall quarter 1973. University policy called for her to be reviewed for tenure in her sixth year of employment. Therefore, her tenure review began in fall quarter 1979. More than 70 percent of the 18 member anthropology department met to consider her tenure and voted 2:1 in favor of tenure. The department chair, Dr. Dunnell, abstained from voting and wrote an independent recommendation which included rationale for each of the department votes. Three department members testified that Dr. Dunnell's letter was negative toward Dr. Amoss and did not properly represent the department's views. Three others felt that it did. In his letter to the dean,

Dr. Dunnell expressed an independent opinion that supported tenure for Dr. Amoss but documented his concerns about her performance and professionalism. The university council, an advisory body to the dean, reviewed all tenure documentation and voted to deny tenure. Two faculty members asked the council to reconsider its recommendation. The dean, Dr. Henley, reported to the university president, the department recommendation, the council recommendation, and his own recommendation which was to deny tenure.

The university provost expressed concern to the dean about the reverse recommendation and asked that the council reconsider its recommendation. The council met, considered new information, and came back with a stronger, unanimous vote to deny tenure. The provost agreed with the second recommendation and the dean advised Dr. Amoss that she had been denied tenure. She appealed to the tenure committee. The tenure committee supported Dr. Amoss' contentions of sexual discrimination and procedural error by a 3 to 2 vote. A minority report held that sex discrimination was only evident at the department level and that:

> . . . any discrimination was mostly attributable to one tenured female Department faculty member whose letter had been attached to Dr. Dunnell's report, but the connection between this alleged discrimination and Dr. Dunnell was "remote at best." 40 Wn. App. 672.

The university president received materials from Dr. Amoss, Dr. Henley, and an assistant attorney general. He heard oral arguments but found no prejudice or sex bias, and agreed with the recommendation to deny tenure. The board of regents upheld the president's decision. An appeal to King County Superior Court resulted in the court affirming denial of tenure.

On appeal, Dr. Amoss contended that the board of regents was required to examine the entire record and uphold the recommendation of the tenure committee. The Court of Appeals found that ". . .the Faculty Code and the statutes vest the final tenure decision in the Board or in the president acting for the Board." 40 Wn. App. 677. The court went on to say:

> Although the rules differ in each institution, agency heads are permitted to decide matters without hearing the testimony developed in a hearing before a fact-finding body below, unless the regulations direct them to defer to the fact-finding body. Agency heads who are responsible for making the ultimate decision typically rely on subordinates, including hearing examiners and fact-finding committees, to sift and analyze the evidence. "Somewhere along the line, however, the one in whose name the decision is rendered must personally address his mind to the evidence and argument and make the decision that he deems them to justify." B. Schwartz, *Administrative Law* § 7.20, at 392 (2d. ed. 1984). "A deciding officer's failure to read the portions of the record cited in the exceptions is not a ground for reversal . . . so long as the officer sufficiently considers and appraises the evidence by other means." 3 K. Davis, *Administrative Law* § 17.3, at 284 (2d ed. 1980). 40 Wn. App. 679.

The court concluded that the board of regents had adequately considered the materials in the case.

In deciding whether the president's decision was erroneous, arbitrary, or capricious, the court reasoned:

> A prima facie case of discrimination is established by evidence that the plaintiff was a member of the protected group, was qualified for tenure, and was not granted tenure in circumstances permitting an inference of discrimination. *Zahorik*, at 92. The ultimate factual inquiry is whether the defendant intentionally discriminated against the plaintiff. *United States, Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983).

> In the present case, the majority of the tenure committee believed that Dr. Amoss was a victim of sex discrimination; however, the majority did not and could not find that she was qualified for tenure. The president upheld the dean's and council's determination that Dr. Amoss was not qualified for tenure and concluded, based on his evaluation of the evidence, that sex was not a motivating factor in that decision.
>
> Our review of the record convinces us that the president's and the Board's findings were not clearly erroneous, arbitrary or capricious, or in violation of Dr. Amoss' constitutional rights. 40 Wn. App. 682

In this review, the court addressed college concerns about research quality and teaching quality as follows:

> The Code of Organizational Procedure of the College of Arts and Sciences, which clarifies standards and procedures the council members should use in tenure decisions, states that research and teaching are the main criteria for evaluation of tenure. Emphasis is to be placed on the quality of publication as a measurement of scholarly achievement. The council members testified that Dr. Amoss' publications did not meet the outstanding quality necessary to warrant granting tenure. A council member recalled that Dr. Amoss' teaching was concentrated in lower division courses. Thus, the council members who testified based their votes on Dr. Amoss' research and teaching. At the third step of decisionmaking, the dean stated that he formed his own opinion independent of the council's recommendation. The dean testified that he read Dr. Amoss' publications first and that his "opinion, based on the scholarly work, was negative." Footnote omitted. 40 Wn. App. 683.

Concluding, the Court of Appeals stated:

> Deficient scholarship is a legitimate, nondiscriminatory reason to deny tenure. *Lynn v. Regents of Univ. of Cal.*, 656 F. 2d 1337, 1344 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982). 40 Wn. App. 684

Dr. Amoss' contentions about violations of appearance of fairness, nondisclosure of the contents of a memo from an assistant attorney general to the university president, and a decision which denied her request for a peremptory challenge of a tenure committee member were considered. The court decided that there was no violation of the appearance of fairness doctrine; the attorney general memo was an attorney-client privilege that had not been waived; and, the denial of a peremptory challenge did not affect the outcome of the tenure decision.

The Court of Appeals affirmed the order of King County Superior Court.

LOSS OF TENURE: FINANCIAL EXIGENCY

Refai v. Central Washington University
49 Wn. App. 1, 742, P. 2d 137 (1987)

Washington Court of Appeals Division Three provided a judicial review to decide whether a tenured professor's termination for reasons of financial exigency was a proper action.

Central Washington University Board of Trustees terminated a tenured associate professor of history because of financial exigency. The faculty member, Dr. Refai, petitioned for judicial review of the decision. Kittitas County Superior Court overturned the decision. Central Washington University appealed.

Central Washington University declared a state of financial exigency in 1981 when Central's general fund dropped about $3.5 million because of legislative cutbacks. Ten nontenured faculty members were laid off. Another legislative reduction came in 1982 and, in April of that year, Central had to cut another $853,000. In addition, the budget for the first year of the biennium had been overrun by about $50,000 and Central's share of WPPSS plants 4 and 5 was about $225,000 which had to be covered in the second year of the biennium. Central's president asked the Faculty Senate Executive Committee (SEC) to review his assessment of the financial situation and, if they agreed that a financial emergency existed, to prepare a faculty layoff plan.

At the SEC meeting in May, the president demonstrated that $450,000 had to be removed from the instruction budget. The SEC agreed with the president's assessment and proceeded to develop a faculty layoff plan, citing the following criteria for the department and program reduction.

> . . . (1) the role of a department or program vis-a-vis the mission and roles of Central; (2) student needs as reflected by enrollment trends; (3) actual staffing versus positions generated by internal ratio and state formula; (4) academic need, *i.e.*, how many faculty members are needed to offer the necessary variety of courses for a given major or program; (5) potential for efficient, reorganization of administrative structure; and (6) programmatic impact. 49 Wn. App. 4

Additional budget reviews concluded that reductions of $167,000 could come from other areas of the college, leaving $283,000 to be cut from the instruction budget. The SEC identified 10 faculty positions that amounted to $283,000. The SEC recommendationed for elimination of faculty was based upon reverse

seniority. The president reduced the number of faculty positions to be eliminated by cutting the physical plant budget, utilities, and the president's emergency contingency budget. The president advised the affirmative action officer of the specific plan for faculty cuts without giving names of the faculty. She reviewed departmental and unit records and said that she had no objection to the plan.

Near the end of May, the president made the proposed layoff plan public and invited written input. Faculty discussed the layoff plan at the SEC meeting on June 2 and at an open forum with the president on June 8. The SEC reviewed responses to the president's request for written input. On June 10, the SEC met with the affected deans and department chairs before finalizing the plan. At this point the plan was modified to remove the physics position from layoff because a layoff there would have detrimental effects on Central's plan to increase its efforts in technology. The budget deficit created by removing one position from layoff was balanced through contributions from the budgets of three other administrative units and from revenue on a contract.

The president sent notices to faculty members scheduled for layoff effective December 31, 1982. A formal dismissal hearing was conducted at Dr. Refai's request and the hearing officer concluded that SEC meetings violated the Open Public Meetings Act of 1971. The board of trustees accepted the hearing officer's findings of fact, conclusions of law, and his proposal for decision but did not agree with his conclusion about the Open Public Meetings Act and decided to layoff Dr. Refai. Dr. Refai sought judicial review. The Superior Court of Kittitas County reviewed the case, then ordered Dr. Refai's reinstatement with back pay. Central Washington University appealed.

The Court of Appeals clarified the nature and scope of its review by pointing out:

> The scope of our review is on the record of the administrative tribunal itself, not of the Superior Court. *Clark v. Horse Racing Comm'n*, 106 Wn. 2d 84, 88, 720 P. 2d 831 (1986); *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn. 2d 317, 323-25, 646 P. 2d 113 (1982), *cert. denied*, 459 U.S. 1106, 74 L. Ed. 2d 954, 103 S. Ct. 730 (1983)
>
> . . .
>
> We will not disturb the Board's findings of fact unless, after reviewing the entire record, we have a definite and firm conviction a mistake has been committed. *Sherman v. Moloney*, 106 Wn. 2d 873, 880, 725 P. 2d 966 (1986); *Franklin Cy.* at 324. We will substitute our judgment, however, for that of the Board's conclusions of law, although we will accord substantial weight to the Board's view of the law. *Clark*, at 88. 49 Wn. App. 6, 7.

Financial Exigency

The court found no reason to believe that a mistake had been made so it agreed that a financial exigency existed and was the reason for Dr. Refai's layoff. The court offered the following rationale for not second-guessing the board of trustees:

> We note further that courts should exercise caution when reviewing this type of decision.
> [W]here lack of funds necessitate[s] releasing a sizeable number of the faculty, certainly it [is] peculiarly within the province of the school administration to determine which teachers should be released, and which retained.
> Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon facts which it believes are for the best interest of the school, and there is no showing that the acts were arbitrary or generated by ill will, fraud, collusion or other such motives, it is not the province of a court to interfere and substitute its judgment for that of the administrative body. *Klein v. Board of Higher Educ.*, 434 F. Supp. 1113, 1118 (S.D.N.Y. 1977) quoting *Levitt v. Board of Trustees*, 376 F. Supp. 945, 950 (D. Neb. 1974). *See also Goss v. Lopez*, 419 U.S. 565, 577-78, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975). 49 Wn. App. 7, 8.

Compliance With the Faculty Code

The Court of Appeals reversed the Superior court decision because the layoff plan clearly stated the rationale for the layoffs; the board of trustees adopted the hearing officer's findings that the layoff plan minimally met the faculty code and contained reasons for the layoff; and, sufficient effort was made to find alternate employment for Dr. Refai.

Affirmative Action

The finding here was that there was no evidence that Central intended to discriminate and layoffs based upon strict seniority did not violate Central's affirmative action plan or Dr. Refai's civil rights.

The Open Public Meetings Act

The Court of Appeals conclusion that the SEC was not subject to the open meetings act included the following rationale:

> The hearings officer found the SEC to be a "governing body" of Central and thus subject to the Open Public Meetings Act of 1971. The Board, on the other hand, found the SEC was not created pursuant to statute and also was not delegated any policy or rulemaking authority and, therefore, was not subject to the act. The Superior Court found, in turn, the SEC to be a governing body of Central because its layoff plan was a necessary antecedent to Central's action.
>
> Whether the SEC is subject to the Open Public Meetings Act of 1971 is a question of law; thus, we make this determination de novo although we afford substantial weight to the Board's decision. *Clark*, at 88
>
> . . .

> . . . we are not persuaded the SEC's formulation of a layoff plan is a "policy or rulemaking" function; the SEC merely makes recommendations subject to the president's modifications. The final layoff decision is the president's, not the SEC's. Here, the president modified the SEC's recommendation. The SEC's authority is quite different from the broad authority exercised by the law school faculty in *Cathcart*. Therefore, the SEC is not a "governing body" of Central and, thus, not subject to the Open Public Meetings Act of 1971. 49 Wn. App. 11, 13.

Due Process

The court called upon several instances of case law in its reasoning toward a decision of whether Dr. Refai had received appropriate due process:

> As a tenured professor, Dr. Refai's interest in continued employment is a property right protected by the due process clause of the Fourteenth Amendment. *Washington Educ. Ass'n v. State*, 97 Wn. 2d 899, 908, 652 P. 2d 1347 (1982); *see also Board of Regents v. Roth*, 408 U.S. 564, 576-78, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972); *Perry v. Sindermann*, 408 U.S. 593, 599-602, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972). The issue is "what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972). 49 Wn. App. 14.

The following rationale was included in the court's decision that Dr. Refai's due process rights had not been violated:

> The president of Central sent Dr. Refai a layoff letter and copy of the layoff plan. The letter described the budget reductions which were necessary to resolve the financial exigency and described the process by which the decision was made. The layoff plan included a list of the criteria used to select the positions for layoff. Dr. Refai received a copy of the pertinent faculty code sections and was informed of his right to appeal the decision. Dr. Refai has followed the appeal process set forth in the faculty code. On balance, we are not persuaded Dr. Refai's due process rights were violated. 49 Wn. App. 17.

The Court of Appeals reversed the Superior Court decision and reinstated the decision of the board of trustees.

Reconsideration by the Court of Appeals was denied. Review by the Washington State Supreme Court was denied.

OTHER JURISDICTIONS

TEACHER DISMISSED: FREE SPEECH ISSUE (ILLINOIS)

Pickering v. Board of Education

391 U.S. 563 (1968)

The U.S. Supreme Court decided that an Illinois teacher's right to freedom of speech was violated when he was dismissed for writing and publishing a letter, critical of the school board and administration, through a local newspaper.

The school board dismissed Marvin Pickering after a full hearing. The Circuit Court of Will County affirmed the decision. The Supreme Court of Illinois affirmed the circuit court decision. Pickering appealed to the U.S. Supreme Court.

Pickering wrote a letter to a local newspaper editor. The letter, which was published in the newspaper, was critical of a proposed tax increase for schools; disputed the school board's handling of an earlier school bond issue; and claimed that teachers were intimidated by the superintendent. The teacher was dismissed for

"writing and publishing the letter." [391 U.S. 566] A hearing was conducted in which the school board concluded that the teacher had made false statements. The Illinois Supreme Court rejected the teacher's contention that his First Amendment rights had been violated "on the ground that his acceptance of a teaching position in the public schools obliged him to refrain from making statements about the operation of the schools . . . ." [391 U.S. 567].

The U.S. Supreme Court, in rejecting this position of the Illinois Supreme Court stated:

> To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. *E.g.*, *Weiman v. Updegraff*, 344 U.S. 183 (1952); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). 391 U.S. 568.

The problem the court faced was balancing the need of the school district to supervise public services with the rights of a teacher as a private citizen to express personal opinions on matters of public interest. The court held that the teacher's opinions were considered to be the same as those of any taxpayer and that they offered no direct threat to the school's ability to supervise because of the relative remoteness of the board and superintendent from the teacher. The court found no evidence that false statements by the teacher were deliberately false or that they caused personal harm to school board members. They were viewed as differences of opinion that could be made by any uninformed taxpayer. The court

pointed out that the expression of different opinions contributed to debates that surround issues of public concern and they were a normal part of the democratic process. The following comment was made concerning public debate:

> The public interest in having free and unhindered debate on matters of public importance--the core value of the Free Speech Clause of the First Amendment--is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard to their truth or falsity. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *St. Amant v. Thompson*, 360 U.S. 727 (1968). Compare *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966).

The court concluded that since the teacher had not "knowingly and recklessly" made false statements, there was no legitimate reason for his dismissal. The Illinois Supreme Court judgment was reversed and the case was remanded.

DENIAL OF TENURE: NO REASON GIVEN (WISCONSIN)

Board of Regents v. Roth

408 U.S. 564, 33 L.Ed. 2d 548, 92 S.Ct. 2701 (1972)

The United States Supreme Court concluded that a probationary tenure-track assistant professor, who did not receive a renewal contract, had no right to a statement of reasons for non-renewal or to a hearing.

U. S. District Court had granted a summary judgment in Roth's favor and called for the University to give him reasons and a hearing. The U.S. Court of Appeals affirmed that decision. The University appealed.

David Roth received a one-year contract to teach political science at Wisconsin State University - Oshkosh. His contract was not renewed for a second year and he had not acquired tenure. Wisconsin required four consecutive years of employment before awarding tenure. The University had clear authority to decide whether a non-tenured faculty contract was renewed. According to Wisconsin State University regulations, tenured faculty could be dismissed only for cause after reviewing written reasons and a hearing. A non-tenured faculty member who was dismissed before the contract ended could request a review of the dismissal. Non-tenured faculty, under university rules, did not have rights to receive reasons or a hearing in the case of non-renewal.

The U.S. Supreme Court pointed out that the University had made no charge against Roth that damaged his reputation in any way. Although Roth had claimed a violation of his free speech rights in the lower courts, that question was not brought to the Supreme Court. The Court recognized that faculty who are legally entitled to employment as a property right could not be dismissed without receiving due process. The property right in this case was Roth's one-year contract. He could not be discharged within the period of the contract without receiving due process. Since the contract had a definite ending date with no mention of renewal, there was no property right beyond the end of the contract.

The court ruled that the summary judgment was erroneous, reversed the Court of Appeals decision and remanded the case.

TERMINATION: POSSIBLE DE FACTO TENURE (TEXAS)

Perry v. Sindermann

408 U.S. 593, 33 L.Ed. 2d 570 (1972)

In *Perry v. Sindermann*, a tenured faculty member claimed that his rights to free speech and due process were violated when he was terminated for publicly criticizing the college administration.

Sindermann brought suit against Odessa Junior College in U.S. District Court. A summary judgment was awarded in favor of the college and the Fifth Circuit Court of Appeals reversed the judgment. The college appealed to the U.S. Supreme Court. The U.S. Supreme Court agreed that he should be given a hearing and returned the case to the U.S. District Court in Texas. According to the present college administration, this case was eventually settled out of court. (Paterno, 1990)

Sindermann had completed four consecutive years at Odessa Junior College, Texas, as professor of government and social science. For a period of time, he was co-chair of the department. Prior to that, he taught for four years at San Antonio Community College and two years at the University of Texas. During the last year of his employment at Odessa, Sindermann became president of the Texas Junior College

Teachers Association. This required him to be absent from the classroom to testify before Texas legislative committees. He became involved in a movement to change Odessa to a four-year college which was in opposition to the Regents' position on the issue. That same year, a newspaper article, critical of the Regents, appeared in his name. At the end of the year, the Regents voted for non-renewal of his contract. The Regents indicated by way of a press release that he had been insubordinate. They did not notify him directly of the reasons for non-renewal, or allow him a hearing.

U.S. District Court awarded a summary judgment in favor of the college because Sindermann's contract had ended and Odessa had no tenure system. The Fifth Circuit Court of Appeals reversed on grounds that although he had no tenure, non-renewal violated his Fourteenth Amendment rights if it was based upon his free speech. According to the Court of Appeals, even without tenure, he would be guaranteed due process if he had an "expectancy" of contract renewal. The Court of Appeals had remanded to clarify both of these issues of fact. The U.S. Supreme Court agreed with the conclusion of the Court of Appeals. It cited many cases in its reasoning that a government agency was not permitted to deny a benefit while infringing on a person's freedom of speech. The Court stated:

> . . . there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech.

. . .

> We have applied the principle regardless of the public employee's contractual or other claim to a job. Compare *Pickering v. Board of Education, supra*, with *Shelton v. Tucker, supra*.
>
> Thus, the respondent's lack of a contractual or tenure "right" to re-employment for the 1969-1970 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights. *Shelton v. Tucker, supra; Keyishian v. Board of Regents, supra*. We reaffirm those holdings here. 408 U.S. 597, 598

The Supreme Court agreed with the Circuit Court of Appeals analysis that factual issues needed to be clarified. The Court pointed out that there was reason to believe there were violations of constitutionally protected rights and said:

> . . . this Court has held that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment. *Pickering v. Board of Education, supra*. 408 U.S. 598.

The Court held that the U.S. District Court judgment on this first issue was improper.

In analyzing the question of due process, the Supreme Court stated:

> We have held today in *Board of Regents v. Roth, ante*, p. 564, that the Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack

> of tenure or a formal contract. In *Roth* the teacher had not made a showing on either point to justify summary judgment in his favor. 408 U.S. 599

Although Sindermann had not shown a deprivation, he had raised issues about his "expectancy" for a renewal contract, including reliance on a long-standing statement in the college's Faculty Guide which stated:

> "*Teacher Tenure:* Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work." 408 U.S. 600

In addition, guidelines in Texas' college and university system assert that teachers who had spent more than seven years in the state system had "some form of job tenure." The court pointed out that absence of a written provision for tenure did not necessarily mean that tenure did not exist. A teacher might be able to show a "legitimate claim of entitlement to job tenure." The court disagreed with the Circuit Court of Appeals' analysis of "expectancy" but agreed that Sindermann should have an opportunity to prove his claim. Finally, the court reasoned that his proof of a property interest would not require his reinstatement. Rather, such proof would require the Regents to grant a hearing if he requested one.

The U.S. Supreme Court affirmed the Fifth Circuit Court of Appeals judgment and remanded the case to U.S. District Court.

BIBLIOGRAPHY

Allard v. Board of Regents, 25 Wn. App. 243, 606 P. 2d 280 (1980)

Amoss v. University of Washington, 40 Wn. App. 666, 700 P. 2d 350 (1985)

Barnes v. Community College District, 20 85 Wn. App. 90, 529 P. 2d 1102 (1975)

Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed. 2d 548, 92 S. Ct. 2701 (1972)

Bowen, Howard R., and Jack H. Schuster. American Professors. New York: Oxford University Press. 1986

Bowing v. Board of Trustees, 11 Wn. App. 33, 521 P. 2d 220 (1974)

Bowing v. Board of Trustees, 85 Wn. 2d 300, 534 P. 2d 1365 (1975)

Causey v. Board of Trustees, 30 Wn. App. 649, 638 P. 2d 98 (1981)

Elliot v. Board of Trustees, 29 Wn. App. 890, 631 P. 2d 985 (1981)

Eyre v. Big Bend Community College, 36 Wn. App. 154, 672 P. 2d 1270 (1983)

Joughlin, Louis, Ed. Academic Freedom and Tenure. Milwaukee: University of Wisconsin Press, 1967

Keppler v. Board of Trustees, 38 Wn. App. 729, 688 P. 2d 512 (1984)

Lehman v. Board of Trustees, 89 Wn. 2d 874, 576 P. 2d 397 (1978)

McLachlan v. Tacoma Community College, 14 Wn. App. 372, 541 P. 2d 1010 (1975)

Nostrand v. Little, 58 WN.2d 111, 361 P. 2d 551. (1961)

Nostrand v. Little, 368 U.S. 436, 7L. Ed 2d 426, 82 S.Ct. 464 (1962)

Perry v. Sindermann, 408 U.S. 593, 33 L.Ed. 2d 570 (1972)

Pickering v. Board of Education, 391 U.S. 563 (1968)

Refai v. Central Washington University, 49 Wn. App. 1, 742, P. 2d 137 (1987)

Rutcosky v. Board of Trustees, 14 Wn. App. 786, 545 P. 2d 567 (1976)

Smith v. Greene, 86 Wn. 2d 363, 545 P. 2d 550 (1976)

Stastny v. Board of Trustees, 32 Wn. App. 239, 647 P. 2d 496 (1982)

Van Alstyne, Arvo. "Tenure System at the University of Utah," in The Tenure Debate. Ed. Bardwell L. Smith. Washington: Jossey-Bass, Inc., 1973

Washington Education Association v. State, 97 Wn. 2d 899, 652 P. 2d 1347 (1982)

ERIC Clearinghouse for Junior Colleges APR 12 1990